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November 9, 2005

The Honorable Harriet Miers
Counsel to the President
The White House
Washington, DC 20500

Dear Ms. Miers:

This week, White House employees are sitting through mandatory "refresher lectures" on how to properly safeguard classified information. President Bush directed you to conduct this remedial education after Special Counsel Patrick Fitzgerald announced a five-count criminal indictment against Vice President Cheney's former chief of staff, I. Lewis "Scooter" Libby, for "allegedly lying about how and when in 2003 he learned and subsequently disclosed to reporters then-classified information concerning the employment of Valerie Wilson by the Central Intelligence Agency."¹ My understanding is that Karl Rove, who is deeply implicated in the leak of Ms. Wilson's identity, may be taking the class today.

An orchestrated disinformation campaign has emanated from the White House and its allies since the involvement of Mr. Rove, the President's top political advisor, in the leak of Ms. Wilson's position at the CIA was first reported over two years ago. White House officials, Mr. Rove's attorney, Republican lawmakers, and conservative pundits have repeatedly misinterpreted and misrepresented the security regulations that apply to the President and his top advisors. I urge you to use the refresher courses to dispel these misconceptions.

My staff has prepared a series of questions and answers that explain the requirements of Executive Order 12958 and the related regulations governing the handling of classified information by government officials. I have enclosed this document in the event that it may be useful to you.

Sincerely,



Henry A. Waxman
Ranking Minority Member

Enclosure

¹ Office of Special Counsel Patrick J. Fitzgerald, *Press Release: White House Official I. Lewis Libby Indicted on Obstruction of Justice, False Statement and Perjury Charges Relating to Leak of Classified Information Revealing CIA Officer's Identity* (Oct. 28, 2005).



REP. HENRY A. WAXMAN
RANKING MINORITY MEMBER
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
NOVEMBER 9, 2005

Fact Sheet

Questions and Answers: White House Security Clearances

The involvement of Karl Rove, the President's top political advisor, and I. Lewis "Scooter" Libby, the Vice President's former chief of staff, in the disclosure of the classified CIA employment of Valerie Plame Wilson was first reported over two years ago. Since then, an orchestrated disinformation campaign has emanated from the White House and its allies. White House officials, Mr. Rove's attorney, Republican lawmakers, and conservative pundits have repeatedly misinterpreted and misrepresented the security obligations applicable to Mr. Rove, Mr. Libby, and the President.

A consistent theme in this campaign has been the effort to overlook the requirements of Executive Order 12958 and the related federal regulations that govern the handling of classified information by federal officials. The obligations of federal officials to protect national security secrets are not limited to the narrow requirements of the criminal code being investigated by Special Prosecutor Patrick Fitzgerald. There are important additional security obligations applicable to federal officials set forth in the executive order and related regulations. And the sanctions for violating these administrative requirements are significant, including the loss of a security clearance and dismissal.

This fact sheet uses a question and answer format to explain the legal requirements of Executive Order 12958 and related regulations and to describe the administrative sanctions that should be assessed for violations.

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Questions and Answers

Is it permissible to disclose classified information inadvertently?

One of the major arguments being made by defenders of Karl Rove is that any disclosure he made regarding Ms. Wilson's position at the CIA was unintentional. Mr. Rove's attorney, for example, has argued that Mr. Rove "did not know of her covert status."¹

It is not clear at this point what Mr. Rove knew about Ms. Wilson. *Time* reporter Matthew Cooper has stated that Mr. Rove informed him that Ms. Wilson worked at the CIA on issues related to weapons of mass destruction.² Mr. Cooper said that when Mr. Rove disclosed this information, he did so on "deep background," prohibiting Mr. Cooper from revealing Mr. Rove as his source.³ According to Mr. Cooper, Mr. Rove also stated that "I've already said too much" and that "things would be declassified soon."⁴ It has also been reported that Mr. Rove was a source for columnist Robert Novak, who first revealed that Ms. Wilson was "an agency operative on weapons of mass destruction."⁵

Even if it is assumed that Mr. Rove did not know that Ms. Wilson's job at the CIA was classified, his actions would still be a violation of Executive Order 12958. Mr. Rove's lawyer has argued that Mr. Rove "never knowingly disclosed classified information."⁶ Section 5.5(b) of the executive order, however, prohibits "knowing, willful or negligent" disclosures of classified information.⁷ In addition, the adjudicative guidelines for determining whether someone should be granted access to classified information state that the "unauthorized disclosure of classified

¹ *Rove's Security Clearance Widely Questioned*, Los Angeles Times (Nov. 6, 2005).

² Matthew Cooper, *What I Told the Grand Jury*, TIME Magazine (July 25, 2005).

³ *Id.*

⁴ *Id.*

⁵ Robert Novak, *The Mission to Niger*, Chicago Sun-Times (July 14, 2003).

⁶ *The Rove Factor*, Newsweek (July 11, 2005) (emphasis added).

⁷ Executive Order 12958, as amended by Executive Order 13292, sec. 5.5(b) (Mar. 25, 2003) (emphasis added).

information” is a “disqualifying” condition for “violations that are deliberate or multiple or due to negligence.”⁸

It is a fundamental mistake to equate the narrow criminal laws being investigated by Special Prosecutor Fitzgerald with the obligations of Mr. Rove and other White House officials. Under the executive order, federal officials have an obligation to safeguard national security secrets from both intentional and negligent disclosures.

Is it permissible to “pass along” or “repeat” classified information learned from one reporter to another reporter?

When Mr. Rove’s conversations with journalists first became public, White House officials “attempted to draw a distinction between leaking the name of an operative and thereby breaking the law, and calling the attention of reporters to that information after it already has been made public.”⁹ Similarly, Mr. Rove’s lawyer has maintained that “he breached no law because he learned Plame’s name from journalists.”¹⁰ The premise of this argument is that it is permissible for a federal official to repeat classified information so long as the official can attribute the information to a reporter or other non-classified source.

Government officials, however, are not at liberty to repeat classified information until they first check to see if the information had been declassified. Section 1.1(b) of the executive order provides that “[c]lassified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.”¹¹ In addition, the “briefing booklet” on safeguarding classified information makes clear that “disclosure in a public source does not declassify the information.”¹² As the briefing booklet explains, officials are required to first “confirm through an authorized official” that the information was not classified before repeating it to reporters.¹³

⁸ Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Mar. 24, 1997) (emphasis added).

⁹ *Privilege Claim Is Possible in Leak Probe*, Los Angeles Times (Oct. 7, 2003).

¹⁰ *Rove’s Security Clearance Widely Questioned*, Los Angeles Times (Nov. 6, 2005).

¹¹ Executive Order 12958, sec. 1.1(b).

¹² *Id.*

¹³ Information Security Oversight Office, National Archives and Records Administration, *Briefing Booklet: Classified Information Nondisclosure Agreement* (Standard Form 312) (undated).

Is it permissible to disclose classified information about an intelligence official if the employee holds a “desk job” at the CIA?

Some Republicans have argued that Ms. Wilson’s position at the CIA was not classified because she worked at a “desk job” at CIA headquarters at Langley, Virginia. For example, House Majority Whip Roy Blunt stated on the television program *Face the Nation*:

You know, this was a job that the ambassador’s wife had that she went to every day. It was a desk job. I think many people in Washington understood that her employment was at the CIA, and she went to that office every day.¹⁴

Contrary to Mr. Blunt’s assertion, the executive order does not contain a “desk job” exception. Nor does it allow security clearance holders to make their own individual case-by-case determinations about whether information is in fact classified. In the case of Ms. Wilson, her position at the CIA is secret. Special Prosecutor Fitzgerald found that “her employment status was classified” and that “Valerie Wilson’s affiliation with the CIA was not common knowledge outside the intelligence community.”¹⁵

Is it appropriate for President Bush to wait until a criminal investigation is complete before taking action on security breaches?

At a June 10, 2004, press conference, President Bush stated that it was “up to the U.S. Attorney to find the facts” about who leaked Ms. Wilson’s status as a CIA official.¹⁶ On numerous occasions since then, the President has asserted that he was waiting for the outcome of Mr. Fitzgerald’s investigation before taking action.¹⁷

This passive approach by the President conflicts with his obligation under section 5.5(e) of the executive order, which requires the President to “take appropriate and prompt corrective action when a violation or infraction under paragraph (b) of this section occurs.”¹⁸ Moreover, the White House position is also a violation of federal regulations implementing the executive order. Under the regulations, any White House employee “who has knowledge of the loss or possible compromise of classified information shall ... report the circumstances to the EOP Security Officer.”¹⁹ The EOP Security Officer is then required to “immediately initiate an inquiry to

¹⁴ *Face the Nation*, CBS News (July 17, 2005).

¹⁵ Grand Jury Indictment of I. Lewis Libby, also known as “Scooter Libby,” p.3 (Oct. 28, 2005) (emphasis added) (hereinafter Libby Indictment).

¹⁶ The White House, *President Holds Press Conference Following the G8 Summit* (June 10, 2004).

¹⁷ See, e.g., White House, *President’s Remarks to the Travel Pool at Summit of the Americas in Argentina* (Nov. 4, 2005); White House, *President Meets with Cabinet, Discusses Hurricane Preparation* (Oct. 24, 2005); White House, *President Holds Press Conference* (Oct. 4, 2005); White House, *President Welcomes Prime Minister of Australia to the White House* (July 19, 2005).

¹⁸ Executive Order 12958, sec. 5.5(e).

¹⁹ 5 C.F.R. sec. 1312.30.

determine the circumstances surrounding the loss or compromise for the purpose of taking corrective measures and/or instituting appropriate administrative, disciplinary, or legal action.”²⁰ The EOP Security Officer is also directed to take “prompt action to investigate” and recommend “appropriate administrative action with respect to violators.”²¹

Is it appropriate for President Bush to allow White House officials to retain security clearances pending investigation?

President Bush has taken no action to suspend the security clearance of Mr. Rove. His current public position is that he will take no action unless Mr. Fitzgerald determines that “someone committed a crime.”²²

President Bush’s failure to suspend Mr. Rove’s security clearance conflicts with his obligations under the executive order. As noted above, section 5.5(e) requires the President to “take appropriate and prompt corrective action when a violation or infraction ... occurs.”²³ The available corrective actions include “loss or denial of access to classified information.”²⁴ Under the executive order, the obligation to take this action is not contingent on the filing of criminal charges.

The rules of other agencies are instructive on this point. Defense Department rules state that “known or suspected instances of unauthorized public disclosure of classified information shall be reported promptly and investigated to decide the nature and circumstances of the disclosure, the extent of damage to national security, and the corrective and disciplinary action to be taken.”²⁵ The Pentagon regulations further provide that the suspension of a security clearance can occur well before any criminal investigation:

The commander or head of the organization shall determine whether, on the basis of all facts available upon receipt of the initial derogatory information, it is in the interests of national security to continue subject’s security status unchanged or to take interim action to suspend subject’s access to classified information or assignment to sensitive duties (or other duties requiring a trustworthiness determination), if information exists which raises serious questions as to the individual’s ability or intent to protect classified information

²⁰ *Id.*

²¹ 5 C.F.R. sec. 1312.22(a)(3).

²² The White House, *President, Prime Minister of India Discuss Freedom and Democracy* (July 18, 2005).

²³ Executive Order 12958, sec. 5.5(e).

²⁴ Executive Order 12958, sec. 5.5(c).

²⁵ Department of Defense Directive 5210.50, *Unauthorized Disclosure of Classified Information to the Public*, sec. 4 (July 22, 2005).

or execute sensitive duties (or other duties requiring a trustworthiness determination) until a final determination is made by the appropriate authority.²⁶

Congressional rules are similar. The Government Accountability Office has promulgated this rule:

The administrative withholding of classified information access is appropriate when significant clearance eligibility questions arise. ... The suspension of a security clearance is an interim procedure to protect the national security.²⁷

GAO has issued a disciplinary guide that sets forth suggested penalties for various security breaches. For cases in which unauthorized disclosures of classified information “result in compromise of the material,” the suggested penalty for a first offense is “14-day Suspension to Removal,” depending on the severity of the breach and the criticality of the information disclosed.²⁸ The suggested penalty for more than two offenses is simply “Removal.”²⁹

Actions after a potential security breach can be relevant to an individual’s trustworthiness and an agency’s decision whether to suspend a security clearance while an investigation continues. In this case, Mr. Rove compounded his previous breaches by claiming to White House Press Secretary Scott McClellan that he was not involved in discussions with reporters about Ms. Wilson’s status as a CIA employee.

On September 29, 2003, Mr. McClellan stated that Mr. Rove assured him personally that he was not involved in discussions with journalists regarding Ms. Wilson’s status as a CIA employee.³⁰ Based on these assurances, Mr. McClellan addressed the White House press corps, stating more than 30 times that the White House had no information regarding the involvement of any White House officials in any conversations with any journalists about Ms. Wilson’s status as a CIA employee.³¹

²⁶ Department of Defense Directive 5200.2-R, *Personnel Security Program*, sec. C8.1.3 (Jan. 1987, incorporating through Change 3, Feb. 23, 1996).

²⁷ Government Accountability Office, *GAO Security Manual, Order 0910.1*, sec. 20 (June 1, 1998).

²⁸ Government Accountability Office, Order 2751.1 — Discipline (Appendix 1 — Guide for Disciplinary Offenses and Penalties, Offense #16) (May 21, 2001).

²⁹ *Id.*

³⁰ The White House, *Press Briefing with Scott McClellan* (Sept. 29, 2003).

³¹ *Id.* (stating that “I have spoken with Karl about this matter”; “I’ve made it very clear that he was not involved, that there’s no truth to the suggestion that he was”; that “it is not something I needed to ask him, but I like to, like you do, verify things and make sure that it is completely accurate,” that “there is simply no truth to that suggestion,” that “that is not the way this White House operates,” that “I’ve made it very clear, from the beginning, that it is totally ridiculous,” and that “I’ve made it clear that it simply is not true, and I’m speaking on behalf of the White House when I say that”).

Is it appropriate for President Bush to apply different security rules to White House officials than are applied to other federal officials?

In effect, President Bush is seeking to apply a different rule to his top political advisor, Karl Rove, than applies to other federal officials. Other federal officials routinely lose their security clearances pending investigations into potential leaks of classified information. Mr. Rove, by contrast, has been allowed to retain his security clearance despite direct testimony from *Time* reporter Matthew Cooper that Mr. Rove disclosed Ms. Wilson's status as a CIA employee to him.³²

There are many cases in which the Administration has suspended the security clearances of government officials pending investigations and without criminal charges being filed. For example:

- Army Reserve Lt. Col. Anthony Shaffer was a Defense Department official who sought to inform Congress about the Pentagon's "Able Danger" program that reportedly "identified four Sept. 11 hijackers before the 2001 attacks."³³ One day before he was scheduled to testify before the Senate Judiciary Committee about the program, the Defense Department suspended his security clearance.³⁴ His alleged security violations reportedly ranged from "flashing military identification while intoxicated"³⁵ to "questions about \$67 in personal charges to a military cellphone."³⁶ Lt. Col. Shaffer has never been indicted or accused of criminal wrongdoing.
- Two mid-level employees of the Department of Homeland Security had their security clearances suspended after they were accused of warning friends and family members of terrorist threats to New York City.³⁷ There is no indication that these employees were indicted or accused of criminal wrongdoing.
- Donald Van Winkle, an employee of the Blue Grass Army Depot, had his security clearance suspended after exposing that the facility's "monitoring system for deadly VX nerve toxin [was] incorrectly configured, threatening the lives of employees."³⁸ There is no indication that Mr. Winkle was indicted or accused of criminal wrongdoing.

³² Matthew Cooper, *What I Told the Grand Jury*, TIME Magazine (July 25, 2005).

³³ *Hunter Asks for Probe of Pentagon Actions Against Whistle-Blower*, The Hill (Oct. 27, 2005).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Rove's Security Clearance Widely Questioned*, Los Angeles Times (Nov. 6, 2005).

³⁷ *Washington in Brief*, Washington Post (Oct. 19, 2005).

³⁸ *Chemical Weapons Worker Seeks Whistleblower Status*, Associated Press (Sept. 3, 2005).

- Russ Tice, a National Security Agency official, had his security clearance suspended after he “reported suspicions that a female co-worker showed signs of being a Chinese spy.”³⁹ Mr. Tice has never been indicted or accused of criminal wrongdoing.
- Sgt. Samuel Provance had his security clearance revoked after he talked to several media outlets “about the mistreatment of a 16-year-old boy and other abuses by interrogators at Abu Ghraib prison in Iraq.”⁴⁰ Sgt. Provance was not indicted or accused of criminal wrongdoing.
- Bill Savich, a State Department official working in a U.S. embassy overseas, had his security clearance suspended in 2003 when he was accused of “having an improper relationship with a local woman.”⁴¹ Mr. Savich denied the accusations, claiming that the Administration is basing its administrative actions on “gossip” and “innuendo.”⁴² Mr. Savich was not indicted or accused of criminal wrongdoing.
- Daniel Hirsch, a State Department diplomat for 20 years, was recalled to Washington and had his security clearance suspended in February 2003 “after his wife asked for marital counseling.”⁴³ He claimed that the Administration initiated “an investigation into the question of spousal abuse and then, of course, found no evidence of spousal abuse.”⁴⁴ There is no indication that Mr. Hirsch was indicted or accused of criminal wrongdoing.

A close parallel to Mr. Rove’s situation is the case of former National Security Advisor Sandy Berger. In July 2004, the press reported that Mr. Berger was under criminal investigation for “removal of classified documents from the National Archives.”⁴⁵ Mr. Berger’s security clearance was promptly suspended pending the criminal investigation.

Executive Order 12958 applies by its terms to all “[o]fficers and employees of the United States Government, and its contractors, licensees, certificate holders, and grantees.”⁴⁶ These rules apply to White House officials.⁴⁷ There is no basis in the executive order for applying a different standard to Mr. Rove than has been applied to these other federal officials.

³⁹ *Security Access Denial At Issue*, Washington Times (Feb. 20, 2005).

⁴⁰ *Sergeant “Flagged” for Telling News Media About Prison Abuses*, Chicago Tribune (May 22, 2004).

⁴¹ *State Department Workers Protest Security Measures*, National Public Radio (Aug. 16, 2005).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *FBI Probes Berger for Document Removal*, Washington Post (July 20, 2004).

⁴⁶ Executive Order 12958, sec. 5.5(b).

⁴⁷ Executive Order 12972 (defining the term “agency” to include “any other entities within the executive branch that comes into possession of classified information”).